In the United States Circuit Court of Appeals

For the Ninth Circuit

J. L. ALVERSON,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant in Error

BRIEF FOR DEFENDANT IN ERROR

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STATEMENT

Shortly prior to January, 1912, the Oregon-Washington Railroad & Navigation Company entered into a contract with the partnership firm of Caughren, Boynton & Company involving the construction by the latter, among other things, of certain concrete structures required in the building of a railroad into the City of Spokane, Washington.

The partnership firm referred to sub-let that portion of their construction work involving the concrete

structures in question to the partnership firm of Alverson and Koeper.

The constructon contract so entered into between these two firms of contractors is attached to the complaint in this action and it will be observed that a railroad form was used wherein the principal contractors designated themselves as "Railroad Company," and the sub-contractors designated themselves as "Contractor." (See Page 7 et seq., Record).

The Caughren firm proceeded with the work reserved to themselves in their contract with the Railroad Company and during the progress of the same controversies arose between the parties to the contract which were submitted to arbitration pursuant to an arbitration agreement entered into April 25, 1912, between the Railroad Company and the Caughren firm (Page 29 Record). This arbitration agreement provided (Page 33 Record), "In the event that the Railroad Company does not elect within thirty (30) days from date hereof to have the contractor complete the structures, the construction of which has not at this date been commenced, then and in that event the Railroad Company shall assume all obligations of the contractor to the party or parties holding sub-contracts for the construction thereof."

The plaintiff in error, Alverson, had dissolved with his partner, Koeper, prior to the execution of this arbitration agreement and for the purpose of this record was a sub-contractor within the terms of the provision of the arbitration agreement quoted.

The Railroad Company not having elected to have the contractor (The Caughren firm) complete the structures yet to be constructed, was for the purpose of this record bound to recognize Alverson with respect to his sub-contract.

The obligation of the Railroad Company to Alverson was measured by the sub-contract Exhibit "A" above referred to. It is so contended by him in his complaint and was so recognized by his counsel upon the trial of this cause (Pages 83 and 84 Record).

The construction work in question was of large magnitude, involving the building of a railroad terminal in Spokane and an entrance into the same upon a route crossing the Spokane River with large bridges at two places in the city. Mr. J. R. Holman assumed exclusive charge of the work on the first day of January, 1913, as Chief Engineer of the Railroad Company (Page 86 Record). *"That the defendant offered to have the work covered by said sub-contract done by the plaintiff in accordance with said sub-contract,"* is specifically admitted and affirmatively alleged by the plaintiff in his pleadings in this case (Page 52 Record).

The plaintiff contends in his complaint, however, that the defendant refused to permit him to perform his contract and let the contract to another firm, to his damage in some Ninety Thousand Dollars ($90,000.00). The defendant answers that it tendered the performance of the work to the plaintiff and that *he refused to perform in accordance with the terms of his said sub-contract,* but that he, the plaintiff, imposed upon the de-

fendant *as a condition of performance,* that the defendant finance him and furnish him the sand and gravel required for the construction work under consideration.

On or about the 10th day of March, 1913, the plaintiff and Mr. Holman took up the matter of this construction work under the contract in question and the plaintiff insisted that he was to do the work under the *arbitration agreement* (Pages 74-75 Record) and that under this arbitration agreement the Railroad Company would have to furnish him sand and gravel and the plaintiff further insisted that the general contractors was to finance him, that the Railroad Company having assumed the obligations of the general contractor would have to finance him (Page 75 Record). Thereupon the plaintiff left for Canada with full knowledge that this large work was impending and without calling upon Mr. Holman again until his return from Canada in the month of December following. In the meantime Mr. Holman took the plaintiff at his word and in the month of July, 1913, let the work to another contracting firm (Page 86 Record).

Upon the trial of this case the Court instructed the jury (Page 87-88 Record), in substance and effect that if they found from the evidence that the plaintiff imposed upon the defendant as a condition for the doing of the work that the defendant furnish him sand without cost to him or gravel without cost to him or imposed upon the Railroad Company the condition of financing the plaintiff, that then and in either of said contingencies, the plaintiff in making said demand and imposing

such condition thereby abandoned and breached the contract and that the defendant was excused from the performance of said contract by it.

Error in this case is predicated by the plaintiff upon the giving of this charge in light of this record and said alleged error is the only question presented by the plaintiff before this Court in this cause, except that the plaintiff does contend that there was a provision in the contract, Section 4 thereof, appearing on page 9 of the Record, which provided *a manner for the Railroad Company* to cancel the contract and that this manner was not pursued. This last question, however, is raised in this Court for the first time and was not called to the attention of the Court below.

Indeed, no error was assigned or complained of in the Court below with respect to the instructions now challenged or with respect to any of the assignments of error made in this Court. The record discloses (Page 91) that upon concluding his charge to the jury, the Court in the presence of the jury inquired of counsel of both parties as follows:

"THE COURT: Anything further, gentlemen?"

To which Mr. Plummer, of counsel for the plaintiff, then and there answered:

"MR. PLUMMER: I don't think of anything, your Honor."

Whereupon the jury retired on the 22nd day of April, 1915, and returned a verdict in favor of the defendant on April 23rd, 1915. Thereafter and on *May*

1st, 1915, the parties entered into a stipulation (Page 92 Record) to the effect that the plaintiff have thirty (30) days in which to take and file exceptions to the Court's instructions, and exceptions in writing were filed to the charge of the Court to the jury on *May 20th, 1915,* or *28 days* after the jury retired to deliberate upon the cause.

POINTS, AUTHORITIES AND ARGUMENT

I.

No exceptions cognizable by this Court are presented by this record and the judgment of the lower Court should be affirmed at the threshold of the case. This Court has consistently declined to review any assignment of error based upon any portion of the charge or instructions of the Court wherein the record fails to show affirmatively that timely exceptions were taken thereto "while the jury was at the bar."

Stone vs. U. S. 64 Fed. 667-677.

Bank vs. McGraw, 76 Fed. 930.

Western Union vs. Baker, 85 Fed. 690.

Beatson Copper Co. vs. Pedrin, 217 Fed. 43-44,

and see:

Star Co. vs. Madden, 188 Fed. 910.

Gladden vs. Gabbert, 219 Fed. 855-858.

Phelps vs. Mayer, 15 Howard 161.

U. S. vs. Carey, 110 U. S. 51.

Stewart vs. Wyoming Ranchie Co., 128 U. S. 383.

II.

It was not in the province of these litigants to make a record in this case. The record was already made before the stipulation was entered into and the purpose of a Bill of Exceptions is to preserve that record and present it in intelligent form for the consideration of the Appellate Court. It will be noted that the stipulation does not purport to consent that exceptions be taken as of the time when the jury was at the bar, nor does the stipulation pretend to afford to the plaintiff in error any other rights under the exceptions to be taken pursuant to the stipulation than such as might attach under the law and practice of the courts involved. Notwithstanding the stipulation the plaintiff in error has no exceptions in this record which this Court can entertain or recognize.

Price vs. Pankhurst, 53 Fed. 312. (Affirmed, 154 U. S. 513).

Western Union vs. Baker, 85 Fed. 691.

Star Co. vs. Madden, 188 Fed. 910-911.

Beatson Copper Co. vs. Pedrin, 217 Fed. 43-44.

Phelps vs. Mayer, 15 Howard 160-161.

The Supreme Court in the case last cited observes that the rule requiring exceptions to be taken while the jury is at the bar was required by the Statute of Westminster 2 and that it has been rigidly observed by the Supreme Court of the United States and by the various Circuit Courts at all times and under all circumstances. In discussing the matter in this Phelps case the Court says:

> "Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice."

In Price vs. Pankhurst, *supra,* the Court of Appeals of the Eighth Circuit observes at page 313 as follows:

> "The party who conceives the charge is erroneous in any respect and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. *Its enforcement does not rest in the discretion of the lower* Court. Its enforcement is essential to the proper and intelligent administration of justice."

The case at bar affords less excuse for consideration than the case from which we have quoted because the record in the present case affirmatively shows positive acquiescence in the charge as given by the Court (Page 91 Record).

Referring to this rule requiring exceptions to the charge of the Court to be taken in the presence of the jury, the Court of Appeals for the Second Circuit in Star vs. Madden, *supra,* speaks as follows with respect to decisions of the Supreme Court of the United States on the subject (Page 911):

> "It sets forth the rule of practice *for all Federal Courts;* has been announced and reannounced many times and has been repeatedly applied in this Circuit."

The record submitted to this Court in the Western Union Telegraph Company case (85 Fed. 691), discloses that the lower Court uniformly followed the practice in all cases of refusing to allow exceptions to be taken in the presence of the jury and would not have allowed exceptions to be taken in said case had it been asked, but that no request was made by either party in said case to take exceptions before the jury retired. The Court in disposing of the case cited with approval Johnson vs. Garber (73 Fed. 523), wherein it is stated (page 527):

> "and the fact that such practice obtained cannot give this Court power to consider an exception which was not reserved at the only time when, *under the law,* it could have been reserved, namely, at the trial, and while the jury were at the bar."

The recent case of Beatson Copper Co. vs. Pedrin decided by this Court October 5th, 1914, is analagous

with the case at bar. With respect to the point under consideration we quote from 217 Fed., Page 44:

> "The points mainly relied upon in argument by the counsel for the plaintiff in error relate to the giving and refusal to give certain instructions to the jury, which, upon reference to the record, we find we are precluded from considering, for the reason that the action of the Court in the respects complained of was not seasonably excepted to; the record showing that the case was submitted to the jury on the 11th of November, 1913, and that the defendant's exceptions were not entered until November 14, 1913—the bill of exceptions reciting:
>
> *'It having been stipulated between the attorneys for plaintiff and defendant in the presence of the jury before it had retired, and in the presence of the Court, that the plaintiff and defendant have until the 16th day of November, 1913, to make and take exceptions to instructions given and refused.'* "

III.

Failure of the Court to charge the jury with respect to the effect of Paragraph 4 of Alverson's contract Exhibit "A" cannot be raised in this Court for the first time. To entitle plaintiff's contention in the matter to consideration, he was required to present the same to the Court below.

Phoenix Railway Co. vs. Landis, 231 U. S. 578-582.

Robinson & Co. vs. Belt, 178 U. S. 41-50.

Clark vs. Fredericks, 105 U. S. 4.

(a) Assuming for the purpose of argument only, that the exceptions of the plaintiff in error filed several weeks after the trial, are entitled to consideration, yet the point is not saved. It was the duty of the plaintiff in fairness to the Court and to opposing counsel to request an appropriate instruction with respect to this clause of the contract and in any event to call the matter to the Court's attention during the trial.

The Francis Wright, 105 U. S. 381-389.

Isaacs vs. U. S. 159, U. S. 487-491.

Humes vs. U. S. 170, U. S. 211.

Texas & Pacific Ry. vs. Volk, 151 U. S. 73-78.

We quote from the Wright case, *supra,* page 389:

> "Every Bill of Exceptions must state and point out distinctly errors of which complaint is made. It ought also to show the grounds relied on to sustain the objections presented so that it may appear the Court below was properly informed as to the point to be decided."

(b) The plaintiff is not entitled to invoke Paragraph 4 of his contract for two reasons, first: Said section contemplates cancellation by the Railroad Company at any time after the contractor has undertaken the work under and in pursuance of the contract. In this case *the contractor refused and declined to proceed with the work under the terms of the contract,* and, secondly: The Railroad Company did not cancel the contract nor declare the same void. *The plaintiff was the actor.* He imposed conditions not within the terms of the cotract as a condition precedent to his proceeding with the work called for by it. He abandoned the contract when he insisted that he was taken care of in a different manner by the arbitration agreement and thereupon in effect told the Railroad Company that if he proceeded with the work, the Railroad Company would furnish without cost to him sand and gravel, and money for financing. He invited a rescission and when the Railroad Company accepted his stand in the matter as final and acted upon it by letting the work to another, a rescission was thereby accomplished.

IV.

A written contract may be abandoned or rescinded by parole and such abandonment or rescission may be inferred from the acts and declarations of the parties.

Chauteau vs. Jupiter Iron Works, 94 Mo. 388-395.

Hobbs vs. Columbia Falls Brick Co., 157 Mass. 109, 31 N. E. 756.

Stanford vs. McGill et al., 72 N. W. 938.

Davidor vs. Bradford, 129 Wis. 524, 109 N. W. 756.

Williams Cooperage Co. vs. Scofield, 115 Fed. 119-123.

The Massachusetts case cited is fairly illustrative of the above proposition. In that case plaintiffs entered into an executory contract with defendant to purchase from the latter a certain quantity of brick. Thereafter the plaintiffs became insolvent and made a voluntary assignment for the benefit of their creditors, of which they gave notice to the defendant. Four (4) months after giving this notice, they informed the defendant of their intention to claim performance under the contract. In the meantime the defendant had sold the brick. The trial Court held that sufficient defense was not made to excuse the defendant from performance, but the Supreme Court in reversing the case observed that the jury could properly have regarded the giving of notice of assignment as equivalent to plaintiffs' saying that they could not go on with their contract, especially when taken into consideration with other circumstances in the case and that the jury might well hold that the defendant was justified in the assumption that they had abandoned the contract. The case is not as strong as the

one under consideration here for the reason that in this case the plaintiff informed the defendant that if it permitted him to do the work it must pay additional consideration in the way of materials and finances. Manifestly, if after the plaintiff took up this proposition with the Chief Engineer of the defendant, the latter had assigned him to the work of prosecuting the contract, such action would have been an assent to the modified terms insisted upon by plaintiff and the defendant would have been compelled to respond to the additional requirements imposed.

V.

To recover for breach of contract it is elimentary that the party must either perform or hold himself in readiness to perform his own stipulations as a condition precedent to his right of action.

Encyc. of the U. S. Supreme Court Reports, Vol. 4, page 582, and cases cited in Note 15.

Elliott on Contracts, Section 1858.

VI.

Where one party to a contract imposes conditions not within the contract such conduct operates to excuse the other party from performing his part, the latter is excused for non-performance.

U. S. vs. Peck, 102 U. S. 64.

Williams Cooperage vs. Scofield, 115 Fed. 119-123.

Stanford vs. McGill, 72 N. W. 939.

Smoot's Case, 82 U. S. (15 Wallace) 36-47.

Lake Shore & M. S. R. Co. vs. Richards, 152 Ill. 59, 30 L. R. A. 1-53.

King vs. Faist, 161 Mass. 449, 37 N. E. 456.

Wald's Pollock on Contracts, 3rd Edition, page 338.

We quote from the text of the authority last cited:

> *"Where no performance has been rendered.* While it is ordinarily the case that a party who seeks to rescind or avoid a contract because of a breach of contract or repudiation by the other party has performed at least in part and desires restitution of what he has given or its value, yet it seems to follow that the same course is open to one who has not performed at all. Such a person will not wish ordinarily to avoid the contract altogether, because that course would deprive him of any right of action whatever. He could seek neither restitution, because he had given nothing, nor compensation in damages for breach of the contract, because he had put an end to the promise on which he must sue. Nevertheless, there are many cases where the injured party is content merely to terminate his legal relations with the other party to

> the contract without more. That he may do this is perhaps intimated by Parke, B., in Phillpotts vs. Evans, 29; it is expressly stated by Compton, J., in Hochster vs. De La Tour, 30, where the repudiation preceded the time for performance by either party. It was so decided in King vs. Faist, 31. There the plaintiff had stated he would not perform unless the defendant gave a guarantee which the contract did not require; whereupon the defendants wrote that they would not perform, and they did not. The plaintiffs sued for this failure to perform, but the Court held it justified, saying: 'Before the defendants were in default under the substituted contract, or had notified him of an intention not to perform it, he himself repudiated it by notifying them that he would not perform it on his part, and thus gave them the right to rescind the contract.' "

and from the Lake Shore case, 30 L. R. A. 53:

> "It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. Kadish vs. Young, *supra.* As said by Bowen, L. J., in Johnstone v. Milling, L. R. 16 Q. B. Div. 460: '*Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, holding fast to the contract to wait till the time for its performance has arrived, or to*

> *act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered.* . . . If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of a contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages."

There are few authorities (Massachusetts, North Dakota and Nebraska) which decline to recognize the English rule of anticipatory breach announced in Hochster vs. De La Tour, 2 El. & Bl. 678, but insofar as we have been able to ascertain from a reasonably thorough search, we find the principle above announced to be uniformly recognized and approved. The confusion and controversy arises over an attempted classification of the cases; some referring to certain lines of cases as illustrative of "breach" of contract while others refer to the contract as having been "rescinded" or "abandoned"; for instance, Chief Justice Corliss in his exhaustive opinion in the Stanford-McGill case, wherein he feels constrained to criticise the reasoning and conclusions arrived at in the English case referred to, says:

> "Many of the cases which appear to support the doctrine of the Hochster

> case are distinguishable on this ground of rescission."

but he likewise observes as follows:

> "When one party to an agreement has violated its obligations in a particular that goes to the root of the agreement, then it is true that the other party may treat his conduct as an offer to rescind, and may acquiesce in the desire so manifested to abandon the contract. In such a case the parties unite in a mutual release of the obligations which reciprocally bind them. So, too, when one party to an agreement expresses, even before the time for performance has arrived, his desire to escape the burdens of the agreement, he thereby offers to discharge the other party from the obligations thereunder resting upon him; and such party may treat such conduct as an overture for rescission, and assent thereto."

VII.

It is immaterial in this case whether the words, acts and conduct of the plaintiff in error be stenciled as "breach," "anticipatory breach," "renunciation," "rescission," "abandonment," or with some other term. The real question is whether the acts and conduct of the plaintiff evinced an intention to be no longer bound by the contract **ACCORDING TO ITS TERMS** and if the plaintiff imposed **AS A CONDITION** for the prosecution of the work that the Railroad Company furnish gravel and sand and afford him financing, then he did evince

an intention to be no longer bound BY THE TERMS of the contract upon which he has based his action. The question whether such ~~contention~~ condition was imposed was the question submitted by the Court to the jury in this case and in so doing no error was committed.

Brady vs. Oliver (Tenn.) 41 L. R. A., N. S. 60-66.

O'Neill vs. Supreme Council (N. J.), Pitney J. 57 Atlantic 463-465.

Roehm vs. Horst, 178 U. S. 1-8 et seq.

Michigan Yacht & Power Co. vs. Busch, 143 Fed. 929-932 (Circuit Court of Appeals 6th Circuit, Lurton, C. J.).

Hayes vs. City of Nashville, 80 Fed. 641-649 (Circuit Court of Appeals 6th Circuit, Taft, C. J.).

Daniels vs. Newton, 114 Mass. 531.

Ballou vs. Billings, 136 Mass. 307-309 (Holmes, J.).

Curtis vs. Gibney, 59 Md. 131-155.

Bell vs. Hoffman, 92 N. C. 273-277.

Armstrong vs. St. Paul, etc., Co. (Minn.), 50 N. W. 1029.

The plaintiff not only imposed the conditions at the time he held his conference with Mr. Holman in the spring of 1913, at which time the plan and work for this terminal were being developed, but he continued to insist upon this condition through the succeeding months and *he even goes upon the stand in this case and boasts of his conduct and boldly asserts that he was right and* by his manner and testimony in effect states that he is still insisting upon the conditions he imposed. At no time has he recalled any of the conditions thus imposed and insisted upon but he has let his words stand and has gone upon the witness stand and re-affirmed them. There has been no tender of performance—no disposition to perform. He was gambling with his contract when he had his conference with Mr. Holman in the month of March, 1913, and the jury certainly entertained that view of the situation. He was also speculating in this case when with much confidence his attorney approved the charge of the Court and let the record stand unchallenged when the jury retired, and then seeks to back into Court upon the return of an adverse verdict. Will this Court say after the reception this gentleman gave Mr. Holman in March, 1913, that he, Mr. Holman, as Chief Engineer of this Railroad Company must hold the prosecution of this large work in abeyance until he could go and plead with Mr. Alverson to recall the conditions that he had so insistently imposed upon him before he went to Canada? Can this man leave an ultimatum of this kind in the door of a Chief Engineer, depart from the country and pay no attention to

the work until it is more than one-half completed and then be heard to say, as his counsel has done on page 12 of the brief and notwithstanding his testimony upon the stand, that he was merely expressing an opinion upon the construction that should be placed upon his contract; that he was simply indulging *"in mere talk"* before the arrival of the time for performance?

True the text writers endeavor to announce certain rules to invoke in the determination of the question as to what constitutes a legal breach or a legal rescission but as stated by Mr. Justice Holmes in the case of Ballou vs. Billings, Supra, page 309:

> "It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach."

and while the Courts have divided on the question as to whether a contract can be breached so as to afford a cause of action before the date stipulated for performance, some, and the great majority including the Supreme Court of the United Sattes (Roehm vs. Horst, 178 U. S. 1) taking the affirmative and applying the English rule announced in Hochster vs. De La Tour, 2 El. & Bl. 678 and Frost vs. Knight, L. R. 7 Ex. 111, and others in the minority asserting in the negative on the reasoning employed in Daniels vs. Newton, 114 Mass. 531, and Stanford vs. McGill, but all are in accord to the effect that if a party to a contract serves notice

upon the other by word or deed before or after time for performance that he will not perform, or imposes as a condition an increase of price or other obligation, then the latter may take him at his word and treat the contract as rescinded. Even the Massachusetts rule recognizes this right; we quote from the leading case of Daniels vs. Newton at page 533:

> "A renunciation of the agreement by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. *It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party has acted upon such disavowal.* But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might

be entitled to require performance. Frazier vs. Cushman, 12 Mass. 277. Pomroy vs. Gold, 2 Met. 500. Hapgood vs. Shaw, 105 Mass. 275. Carpenter vs. Holcomb, 105 Mass. 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. Phillpotts vs. Evans, 5 M. & W. 475. Ripley vs. McClure, 4 Exch. 345. Lovelock vs. Franklyn, 8 Q. B. 371."

Compliance with a contract contemplates a compliance according to its legal effect. From page 277 of the North Carolina case above cited the following:

"The plaintiff was bound to comply with the agreement *according to its legal effect; he failed to do so at his peril;* and his failure and refusal to deliver the goods on the day specified, was non-compliance with it. His claim that ten per centum should be added to the prime cost price of the goods was obviously unfounded. The plain terms of the agreement, left nothing to doubt, the prices to be paid were fixed, and they were the 'wholesale prices as per invoice from G. Oppenheimer & Son.' Any question as to prime costs and ten per centum added thereto, was outside of and foreign to the agreement.

It seems that the plaintiff thought so himself, for afterwards, on the same day, he proposed to abandon his demand. This proposition came too late; several hours before he made it, he had refused to comply with the agreement; one flat refusal was enough."

and from the Armstrong case (Minn.), 50 N. W. 1029:

> "That, where one party to an executory contract repudiates it by refusing to be bound by its terms, the other party may take him at his word, and act upon it by treating the contract at an end, and bring an action for damages for its breach, is, of course, elementary. The only question is, what will constitute a repudiation? The true test, stated generally, is whether the acts and conduct of the party evinced an intention no longer to be bound by the contract; and the fair result of the authorities is that it is not only an absolute refusal in words to perform a contract, but also any clear manifestation by words or acts of an intention *not to perform it according to its terms, that will authorize the other party to treat this as a repudiation and bring his action.* Consequently, where the seller receives notice from the buyer that he will not pay the contract price for the goods, he has a right to treat this as a repudiation of the contract, stop delivery, and bring his suit for damages. This is, in our opinion, just what the evidence in this case conclusively established. The contract price of the coal was one sum. The plaintiffs, in effect, said to defendant: 'We will only pay for it another and less sum; in other words, if you go on and perform your side of the contract, we will not perform ours. You must go on and deliver the coal, but we will not pay you for it, as under the contract we ought.' The legal effect of this was not changed by the fact that it was coupled with a profession that they were ready and willing to perform the contract, for *manifestly the 'contract'*

which they asserted their willingness to perform was not the contract of the parties, but an entirely different one. Neither did it make any difference, so far as concerned defendant's right to act on this as a repudiation, that it might not have been willful or fraudulent, but the result of a mistake as to the terms of the contract. *In planting themselves on their own construction of it, the plaintiffs took their chances; and, as it was in fact incorrect, they must stand the legal consequences of their acts.* It is doubtless true that there may be acts of default in the performance of the strict terms of a contract which would not evince any intention to repudiate its obligations, and which consequently the other party would have no right to treat as a repudiation. An example of this is Iron Co. vs. Naylor, L. R. 9 App. Cas. 434, cited and relied on by plaintiffs. But this is clearly not such a case. There are also cases where one party, before the day of performances arrives, gave notice that he would not perform his contract, and yet the other party was held not entitled to recover damages, on the ground that he had not acted on the notice as a repudiation, but treated the contract as still on foot. Avery vs. Bowden, 5 El. & Bl. 714, also cited by plaintiff, is an instance of this kind. But these cases turn on the fact that the party had not acted on the notice, which, as is said in one case, amounts to nothing until the time when the buyer ought to receive the goods arrives, unless the seller acts on it in the meantime. In the present case the defendants did act on the notice, and

> treated it as a repudiation of the contract, and stopped delivering the coal."

and from Withus vs. Reynolds, 2 Barnewall & ad 882, Lord Tentenden, C. J.

> "I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, ~~being~~ bring an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiffs saying, 'I will not pay for the goods on delivery,' it was incumbent on the defendant to go on supplying straw, and he clearly was not obliged to do so."

The case of Kadish vs. Young, 108 Ill. 170, 43 Am. Reports 548, 30 L. R. A. 49-50, is to the effect that a seller of grain on receiving notice from purchaser that the latter would not be bound by the contract was not *bound* to act upon the notice, but was entitled notwithstanding, to tender, etc., on day for delivery fixed by the contract *but the Court will recognize the doctrine that the party receiving the notice might have acted upon it, and accepted and treated the contract as broken.*

In the Michigan Power Company case, Judge Lurton, speaking for the Circuit Court of Appeals of the Sixth Circuit (pages 932-933), says:

"When the question is whether one party is relieved from the performance of his part of the contract by the conduct of the other in failing to make a payment when it was due, we must look to all of the circumstances of the case to see whether that conduct amounts to an out and out refusal to perform the contract. This is the substance of what is said in Withers vs. Reynolds, 2 B. & Ad. 882, 885; Freeth vs. Burr, cited above; Mersey Steel Co. vs. Naylor, L. R. 9, App. Cases 434, 438; Norrington vs. Wright, 115 U. S. 188, 210, 6 Sup. Ct. 12, 29 L. Ed. 366, and by this court in Cherry Valley Iron Works vs. Florence Iron Co., 64 Fed. 569, 572, 12 C. C. A. 306, and in Monarch Cycle Co. vs. Roger Wheel Co., 105 Fed. 324, 44 C. C. A. 523. Mere non-payment of an installment when due is an element of importance, and in some circumstances may evince a renunciation of the contract. But this case, as shown by the correspondence and other evidence, was not a simple case of omission to pay as the plaintiff was bound to do, but was a positive refusal to perform the contract upon his part *unless the defendants would give him a security they were under no obligation to give. That he was willing to have the contract carried out if the defendants would accede to his terms and do what they were not obliged to do does not help the case but only serves to emphasize his determination not to carry out the contract as it was written, and justified the defendants in treating the plaintiff as having renounced the agreement.*"

In the Roehm-Horst case, 178 U. S., the Court calls attention to the different footing upon which money contracts, pure and simple stand, as compared with executory contracts for the purchase and sale of goods (page 18) and it seems to us that executory construction contracts carrying interdependent obligations and requiring execution as a whole may well be distinguished from contracts involving the sale and purchase of goods.

True a different legal principle would probably not be involved, but in a contract like the one under consideration involving large engineering problems and requiring months for execution, the party calling for the construction to be done would be much more readily justified in treating the other party's refusal to perform according to the terms of the contract as a rescission and abandonment, or in other words, taking him at his word, than in a case wherein a commodity that was available in the market was being contracted for. The Supreme Court in the case just referred to quotes the Hochster-De La Tour case approvingly, criticises and declines to follow the Massachusetts case of Daniels vs. Newton and then observes (page 19):

> "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance

> is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a locus penitentiae be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction per se is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?"

Now if it is true that we were entitled to maintenance of contractual relations up to the time for performance as well as to performance, can counsel successfully assert that we were receiving the "maintenance" of contractual relations under Exhibit "A" pleaded by him in this case as a foundation for his recovery when the plaintiff himself admits that he insisted upon terms other and more burdensome than imposed by the contract not only at the time he was discussing its performance with Mr. Holman, but even up to and including the trial?

VIII.

We do not consider it necessary for the decision of this case that the Court harmonize or review the multitude of decisions upon the question of breach and rescission of contracts, but assert the proposition that even if counsel's contention be entertained that plaintiff was

simply expressing loose and untenable views that he did not mean to insist upon, **YET HIS CONDUCT PRECLUDES HIM FROM ASSERTING ANY CAUSE OF ACTION AGAINST THE DEFENDANT IN THIS CASE.**

Armstrong et al. vs. St. Paul & Pacific Coal Co., 50 N. W. 1029.

Smoots case, 15 Wallace 36-47.

Wald's Pollock on Contracts, 3d Ed., Page 338.

In the Armstrong case the Court recognizes that there are cases where the action of one party to a contract would be such as to constitute defense if the other party was sued for failure to perform and yet not sufficient to authorize the latter to abandon the contract himself and as plaintiff, recover profits which he would have made if the contract had been fully performed.

In the Smoots case claimant entered into a contract with the war department to furnish and deliver cavalry horses within a stated period. After the contract was entered into the mode of inspecting horses was changed and the Government imposed regulations entirely unreasonable and unenforcable involving, among other things, the branding of rejected horses with an "R." The plaintiff claimed that in view of these regulations owners would not sell him horses subject to the inspection and that the procedure constituted

a fraud by the inspectors and excused him from tendering performance or submitting horses for inspection. The Court rejected his claim for speculative profits, but in doing so observed as follows:

> "We are also to remember that the question to be considered is not whether the action of the cavalry bureau would have been a defense if the claimant had been sued for a failure to perform his part of the contract, but whether it was sufficient to authorize him to abandon the contract himself, and as a plaintiff recover against the other party the profits which he would have made if it had been fully performed."

The old case of McCasken vs. Smith, 16 La., Rep. 32, wherein the substance of the decision is stated in the syllabus as follows:

> "Where a workman, by the job, demands more than is authorized by his contract, and, on being refused, leaves his work uncompleted, the adverse party may immediately employ other workmen to complete the job, and the former cannot recover, even if he returns and afterwards offers to perform the work."

was good law and even-handed justice in 1840, and ever since has been and is, we think, the proper rule of law to apply in the case at bar.

IX.

If one of two contracting parties is prevented from performing by the act or conduct of the other, the latter is excused from tendering performance.

Turner vs. Parry, 27 Ind. 163.

Phoenix, etc., Ins. Co. vs. Hinesley, 75 Ind. 1.

Mathis vs. Thomas, 101 Ind. 119.

CASES CITED BY PLAINTIFF IN ERROR

Colby vs. Reed, 99 U. S. 560, why cited or of what application to a case wherein renunciation and rescission of an executory construction contract is claimed, we are unable to comprehend. It was a case wherein the parties joined in a $200,000.00 stock subscription of which the plaintiff's share was $45,000.00; a further subscription of $100,000.00 from them was called for and plaintiff could not pay his share, whereupon they agreed that defendant would make the additional subscription alone and that plaintiff would transfer to defendant $5000.00 of his, the plaintiff's stock; the latter also pledged additional shares, $8000.00 worth, to defendant to secure a loan of $2000.00. The plaintiff brought action against defendant for the stock in his hands to the amount of $45,000.00; the defendant claimed that having demanded $13,000.00 more than he was entitled to, plaintiff could recover nothing.

The principle announced by the Court in disposing of the case is stated in the syllabus as follows:

> "Where the amount to which the plaintiff is entitled is clear, an action by him for a breach of the contract will not be defeated solely on the ground that his demand upon the defendant was in excess of that amount."

Smoot's case, 82 U. S. 37(involved the law of sales of personal property, and with respect to same the Court quotes approvingly from Benjamin on Sales to the effect:

> "A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

Dingley vs. Oler (117 U. S. 491) is another case of personal property sale.

In 1879 "O" contracted the sale of a cargo of ice to "D" from the former's house "next year." In July, 1880, "D" demanded the ice and "O" refused to make the delivery at that time but asked for reply to his letter and requested a personal interview. "D" sued without making reply either in person or by letter.

The case was tried without a jury and the Supreme Court held:

> "The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the defendants, for what they said on July 15th amounted merely to a refusal to comply with the particular demand then made for an immediate delivery."

Armstrong vs. Ross, 55 S. E. 895, was a case wherein the parties were in dispute as to the proper construction of a contract for the sale of coal land. Just what took place or what the dispute was does not appear except that Armstrong was apparently claiming more land than his contract entitled him to. He was claiming, however, *under his contract* and *sought specific performance of his contract.* The Court denied Ross' contention that the making of a claim for too many acres by Armstrong operated to relieve him, the vendor, from conveying any.

Stanford vs. McGill, 72 N. W. 938, conceded by plaintiff in error not to be in point of the facts.

Emack vs. Hughes, 52 Atl. 1061.

This also is a case of sale of personal property. Both parties entered into and participated in the performance of it, but became involved in controversy. Plaintiff wrote a letter to defendant stating:

> "If you don't ship my orders to the exclusion of all others, until you have reim-

> bursed me for advances, I shall put the matter in the hands of my attorney in Vermont and let him do the settling."

The Court held that the latter did not constitute a breach of the contract, and then observed as quoted on page 20 of Brief of Plaintiff in Error. Manifestly there is nothing in this case helpful to the Court in passing on this case.

Ga Nun vs. Palmer, 96 N. E. 100.

"G" entered into a contract with "S" to care for her during her life for which "S" promised to pay $70.00 per month and $20,000.00 to be paid upon the death of "S." After a few months "S" left "G" and lived the remainder of her days with "P" to whom she transferred her property. "G" sued "P" and the latter contended that "S" breached the contract when she left "G" and that the statute of limitations ran from that date. The Court held in effect that it was optional with "G" to recognize the renunciation involved in the departure of "S" and sue for damages *or* treat the same as inoperative thereby keeping the contract alive until the death of "S." The latter course having been pursued by "G" it was determined that the statute commenced to run from the date of death.

Lundahl vs. Hansem, 35 N. E. 741, fairly illustrates how we may be misled by following some proposition of law stated in a general way and not presented with the facts in the case wherein the language is employed.

In this case "H" contracted to sell, and "L" to purchase certain land on an installment contract. "H" extended the time for the payment of a given installment, but his agent in "H's" absence, refused to recognize the extension and declared the contract forfeited. "L" refused to treat the contract as at an end and "H" offered to go on with the contract. "L" instituted suit to cancel the agreement and the Court held no showing was made to justify interposition of equity to cancel, but that "L's" remedy was either a suit to compel specific performance or an action at law on the contract, for its breach.

Bell vs. Maximos, 19 S. W. 1070-1072

Was a case of agency wherein defendants were buying cotton for plaintiff. Plaintiff demanded invoice of their purchases and defendants apparently claimed repudiation of the contract for the reason that same did not, according to their contention, require the furnishing of the invoices. The Court held that when the defendants purchased the cotton for the use and benefit of the plaintiff, it thereupon became his property and the defendants were therefore required to account to the plaintiff for proceeds realized from the sale of same.

We submit that the judgment of the District Court in this case should be affirmed.

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